quired to be done. In our view, the possession that was given to the contractor was only such as was reasonably necessary for the purpose of weeding and maintaining the Scheme. Felda, therefore, was still an occupier.

Now what duty did Felda as an occupier owe to the deceased invitee? And, what duty did it breach?

The kongsi-house was not built by Felda, but it knew that it was there and therefore it must have known that labourers lived in it. Although Felda seemed rather indifferent to its existence, the kongsi-house was not illegally erected as the contractor was entitled to build it under clause 3 of the agreement, requiring the contractor to provide "everything necessary for the proper execution of the works". Provision for labourers' accommodation is surely one of the many things necessary for the proper execution of the works and therefore within the terms of this clause. Without the kongsi-house labourers could not be housed and without labourers works under the contract could not be performed. Thus, the erection and existence of the kongsi-house are for the common benefit of Felda, the contractors and the labourers.

Can Felda now turn round and say it was not liable to the injured occupant because it did not build the kongsi-house? In our view, it cannot. Although Felda did not build it, it allowed it to be erected and used by the weeding labourers, whose work benefitted Felda, and although it had control and supervision of the Scheme and the well-being of the labourers, Felda did nothing to ensure that the kongsi-house was safe for them to live in. It only allowed it to exist and be used. We cannot accept this indifferent attitude as absolving Felda of its duty of care, especially when it is a statutory authority established by the legislature entrusted with social and economic responsibilities. In the discharge of these responsibilities Felda must be fully alive to the object and purpose for which it was established. In this case whilst it correctly retained control and supervision of the Scheme and the general well-being of the labourers, it did nothing to ensure compliance of the obligations undertaken by the contractor. In our view, this is not enough. It must go further and see that they are complied with.

The kongsi-house for unknown reason collapsed. No proper explanation was forthcoming from Felda. An attempt to show that it was caused by a whirlwind failed because the evidence is hearsay.

We therefore held that *res ipsa loquitur* applies in that the kongsi-house must have been unsafe for human occupation and Felda is, therefore, guilty of negligence.

That being the case the appeal is dismissed with costs. The deposit should be paid to the respondents.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Murphy & Dunbar.*

SEONG FATT SAWMILLS SDN. BHD. v. DUNLOP MALAYSIA INDUSTRIES SDN. BHD.

[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Syed Agil Barakbah F.JJ.) November 18, 1983 & February 20, 1984]
[Kuala Lumpur – Federal Court Appeal No. 266 of 1981]

Torts – Water flowing from land to neighbouring land and causing damage – Negligence – Nuisance – Liability of owner or occupier of land for escape of water naturally on land – Alteration of natural course of stream.

Practice and procedure – Appeal on questions of fact – Whether appeal court should interfere with finding of trial court.

In this case the learned judge who tried the case had to consider on the evidence before him whether (a) the appellants did carry out substantial earthworks on their land as alleged by the respondents; (b) that as a result of the substantial alterations to the appellants' land, there was created a dangerous situation; (c) that by reason of the aforesaid there was an unnatural use of the appellant's land; (d) that the appellants knew or ought to have known that it was likely to affect the natural flow of water and the previous controlled drainage.

Among the particulars of negligence the respondents alleged that the appellants (a) failed to heed the warnings that the said works could result in serious and sudden floods and could cause damage to the respondents; (b) failed to take any steps to prevent the collection of water on the appellant's land and to prevent the escape of such water, rubble, soil and debris on to the respondent's premises.

The respondents claimed damages in negligence and nuisance as a result of the flood damage caused to their factory and goods. The learned trial judge gave judgment for the respondents. He accepted the evidence of the witnesses on behalf of the respondents and was of the

view that the evidence adduced by the respondent was in all probability correct and was to be preferred over that of the appellants' evidence. The appellants appealed.

Held: (1) there was ample material upon which the learned judge could base his decision as to the facts. On the evidence admitted and the uncontroverted evidence obtaining, there was full justification for the learned judge to arrive at the finding that he did;

(2) the learned judge was right in concluding that the flooding of the respondents' land and consequential damage was directly and effectively caused by the negligent acts of the appellants. Such acts conceivably had created nuisance;

(3) the learned judge was correct in giving a supplementary judgment, after re-opening the case to hear arguments on damages, to award damages for loss of profits. Where it is necessary and the justice of the case requires it, the court should be at liberty to re-open the case, particularly where there has been only a provisional order and this is done to perfect an order;

(4) on the other hand the learned judge should not have awarded damages for inconvenience as no claim was made in the statement of claim for such damages and nothing was said by counsel for the respondents in his submission in respect of such damages.

Cases referred to:

(1) *Coghlan* v. *Cumberland* [1898] 1 Ch. D. 704.
(2) *Bigsby* v. *Dickinson* (1876) 4 Ch. D. 24.
(3) *Watt* v. *Thomas* [1947] 1 All E.R. 582
(4) *Chow Yee Wah & Anor.* v. *Choo Ah Pat* [1978] 2 M.L.J. 41.
(5) *Muthusamy* v. *Ang Nam Cheow* [1979] 2 M.L.J. 271
(6) *Loke Hong Kee (S) Pte. Ltd.* v. *United Overseas Land Ltd.* [1982] 2 M.L.J. 83.
(7) *Fletcher* v. *Smith* (1877) 2 A.C. 781.
(8) *Pemberton & Anor.* v. *Bright & Ors.* [1960] 1 All E.R. 792.
(9) *Greenock Corp* v. *Caledonian Ry. Co., Greenock Corp.* v. *Glasgow and South Western Rly. Co.* [1917] A.C. 556.
(10) *Re Barrell Enterprises & Ors.* [1972] 3 All E.R. 631.
(11) *In re Harrison's Share Under a Settlement etc.* [1955] 1 Ch. 260.

FEDERAL COURT.

Lim Kean Chye (*Sothinathan* with him) for the appellants.

P.C. Ranjan for the respondents.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the Judgment of the Court): On November 19, 1976, there was a heavy rainfall. It was in the afternoon of that day, still raining, that the respondents' factory was flooded. Dulip Kumar Bardhan (PW1) Manager of the Dunlopilo factory succinctly described that eventful day as follows:—

"On November 19, 1976 in the afternoon I was in my office at the factory. It was raining. I heard a commotion and I saw water running under the door of my office. I went out to the corridor and I saw water rushing in like mad as if a bund had broken. The water was rushing from the back of the factory towards the front. The water was muddy with silt and rubbish. The water also carried timber pieces and debris – and drums and crates. I then went to the back of the factory from where the water was rushing. The water was about 12-14 inches deep. I waded through and went to the back of the factory to the outlet. This time I saw that the fence had completely collapsed to our land. The outlet was all blocked with sawn timber, debris and wood. Our drain was running full at that time. Along our drain we had built a bank about 2 feet high. At that time the drain water had risen about one foot up the bank."

As a result of the flood damage was caused to the factory and goods. There was also a loss of a few days' work. By reason of the damage suffered the respondents sued the appellants Seong Fatt Sawmills Sdn. Bhd. They claim that the appellants carried out substantial earthworks in or about early 1974 on their land adjacent to the respondents' land creating thereby a dangerous situation. And the negligent acts of the appellants had caused rain water to overflow into the respondents' land causing extensive damage to the respondents' land, roads, buildings and goods stored therein. The claim is based on negligence and nuisance.

The appellants deny that their water flowed over to the respondents' land by their negligence. They also deny that they owe any duty to the respondents in respect of the matter complained of by the respondents.

The facts have been summarised by the learned Judge in his judgment and suffice if we reproduce that part of the judgment which reads —

"the plaintiffs' and the defendants' land have a common boundary. The plaintiffs' case is that the defendants altered the natural structure of their land which resulted in overflowing of water from their land on to the plaintiffs' land. Before the alterations were carried out there was a natural stream running through the centre of the defendants' land. This stream joined the plaintiffs' land along the boundary on to a monsoon drain which also ran along the boundary but inside the plaintiffs' land and on to another monsoon drain at the junction of Loop Road and Rasa Road in front of the plaintiffs' factory. The stream which ran through the defendants' land widened at two places at depressions forming two pools on the defendants' land. This had the effect of slowing down the rain water and thus avert flooding during the rainy season.

In April – May 1973 the defendants cut the side of the hill on their land and filled their land. They filled up the ponds and raised the level of their land by almost four feet above the level of the plaintiffs' land. The natural

stream which was previously running through the middle of the defendants' land and then joining the plaintiffs' monsoon drain along the common boundary was diverted by the defendants. This they did by building an earth drain along the border and this drain entered the plaintiffs' land into the plaintiffs' earth drain. The plaintiffs' earth drain was meant to take water from the rear of the plaintiffs' land but now they had to take water also from the defendants' drain which the defendants had now constructed and which ran along the plaintiffs' boundary along a cliff. The defendants had built the drain right at the cliff, one bank of the drain being the cliff itself. It was a plain earth drain and had four right angles before it entered the plaintiffs' drain."

In support of the respondents' case Bardhan (PW1) stated that every time it rained chunks of earth fell off from the cliff closing off the appellants' drain below and broke up the respondents' fence. Portions of the respondents' road and that part of the chain link fence which ran along the common boundary were also damaged.

He recalled that when he noticed the erosion and the collapsing of the road and fence, he expressed his concern to David Chan (DW3) the appellants' manager, who promised to build a concrete retaining wall along the cliff and to divert the drain to enable water to flow smoothly. He had several meetings with David Chan and sent letters from May 1974 onwards but received no response.

On November 11, 1976, the first flood occurred around the area where the respondents' drain met the outlet of the appellants' drain caused by the collection of debris, sawn timber and rubbish all along the drain towards the outlet. The chain link fence near the outlet was slightly bent. The next morning PW1 saw David Chan who said that nothing could be done in the wet season.

In considering the respondents' case, the learned Judge had before him the testimony of PW1 to the effect that the cause of the flooding was due to the closing up of the drain by silt and debris resulting in water overflowing on to the appellants' land and into the respondents' land. All the sawn timber and debris came from the appellants' land which was then used as a timber yard. The silt came from the breaking up of the banks of the drain on the appellants' land.

The learned Judge also had before him the testimony of Lim Keng Shea (PW3) the Chief Engineer of the Seremban Municipality who stated there was no planning application by the appellants to carry out any earthworks on their land and to build the large timber shed. He also stated that it was necessary to obtain permission to erect a retaining wall or to build a timber yard. He further stated that in order to divert a natural stream a consultant engineer should have been engaged and a plan submitted for approval. It was then for the Municipality to consider the availability of land for diversion and the adequacy of the discharge of water entailed by the proposed diversion. He concluded by saying that the appellants' land had been flattened and there was no drain provided.

There was also before the learned Judge the testimony of Mohd. Tahir bin Hj. Abdul Manan a consultant engineer who commented on Chester Ho's report. It was his view that the water overflowed the banks of the drain due to the insufficient size of the drain. It was also his view that the large quantity of water swept away with it all the rubbish, debris and planks and deposited them at the fence, at the lowest point of entry into the respondents' land. A dam was formed at the fence thereby causing the flood water to rise to such level that the fence collapsed and the water overflowed to the respondents' side. He further expressed the view that the area had been disturbed. Previously there was a stream, drains and ponds on the appellants' land and they somewhat controlled flooding. He added that the drain on the appellants' land should have been improved to cater for the run-off from the whole of the catchment area.

The appellants' case was drawn from the testimony of four witnesses namely Ong Eng Kee (DW1) Director of Drainage and Irrigation Department, Negri Sembilan, Chester Ho (DW2) a civil engineer, Dato David Chan Foo Yew (DW3) and Mohinder Singh a police constable who lived near the area.

In considering the defence the learned Judge observed that DW1 gave technical evidence on rainfall while DW3's evidence was confined to the general set-up of the appellants' as well as the respondents' land. He also observed that DW1 conceded that the appellants diverted the stream and filled the ponds on the land. DW4's testimony was essentially a recollection of the set-up of the land where he used to graze cows as a 14 year-old boy.

The only witness who gave evidence pertinent to the appellants' case was Chester Ho (DW2) who

sought to explain the sequence of the occurrence of the flood.

In his view the drainage system was under capacity. As flood waters increased in volume the monsoon drain over-flowed and the water spilled over the lower lining ground of the compound of the respondents' factory. The level of water continued to rise as more flood waters flowed down and could rise higher than that of the factory floor. While this occurred the common boundary drain at the rear of the respondents' factory became full at certain points and water spilled over. He attributed the insufficiency of the culvert in front of the respondents' factory as one of the causes of holding back of flood waters and the flooding. He disagreed that waters rushed from the rear and crashed the fence and on to the respondents' factory. Explaining the presence of debris and log DW2 expressed the view that when the log reached the fence, the fence collapsed and articles from the appellants' land went over to the respondents' drain. They were carried down the drain and came to rest at the point shown in the photograph. DW2 also expressed the view that the flow of water must have been very large to carry the log that far. DW2 disagreed that the diversion of the stream on the respondents' land and its new direction would have increased the flow of water. Speaking of the two ponds on the respondents' land, it was his opinion that the available storage was very small viewed in relation to the flow of flood water. In his estimation, the storage would have been filled up within 82 seconds. He did not think they were sufficient flood control ponds. Even assuming the ponds and the stream were there it would still have flooded.

Under cross-examination DW2 admitted that the earth fillings had been done on the appellants' land. The earth came from the cliff. He also admitted there was a deviation of the stream, otherwise the flow of water would have been through and out of the appellants' land and the result would have been ponding and flooding of up-stream of the appellants' land.

Questions for determination by the learned Judge

The learned Judge had to consider whether on the evidence before him, on the balance of probabilities, he was satisfied – (a) that the appellants did carry out substantial earthworks on their land as alleged by the respondents; (b) that as a result of the substantial alterations to the appellants' land there was created a dangerous situation; (c) that by reason of the aforesaid there was an unnatural use of the appellants' land; (d) that the appellants knew or ought to have known that it was likely to affect the natural flow of water and the previous controlled drainage.

Among the particulars of negligence the respondents alleged that the appellants – (a) failed to heed the warnings that the said works could result in serious and sudden floods and could cause damage to them (respondents); (b) failed to take any sufficient steps to prevent the collection of water on their (appellants') land and to prevent the escape of such water, rubble, soil and debris on to the respondents' premises.

In considering the appeal we would draw our attention to the finding made by the learned Judge and for convenience we reproduce hereunder that portion of the judgment where he said –

> "On the evidence before me I have come to the conclusion that the plaintiffs must succeed in their claim for damages against the defendants. I find the defendants liable in negligence and nuisance. I accept the evidence of the witnesses produced on behalf of the plaintiffs. As for the technical reports and the evidence of the experts I am of the view that on the totality of the evidence in this case the evidence adduced by the plaintiffs is in all probability correct and is to be preferred over that of the defendants' evidence.
>
> Liability in respect of water is stated as follows in *Clerk & Lindsell* on Torts 13th Edition at page 851 paragraph 1498 –
>
> > 'Liability in respect of water depends on whether the water is naturally on the land or whether it is artificially accumulated or interfered with in some way. The owner of land on a lower level cannot complain of water naturally flowing or percolating to his land from a higher level. Nevertheless the higher proprietor is liable if he deliberately drains his land onto his lower neighbour's land and this appears to be so if the water is caused to flow in a more concentrated form than it naturally would, as the result of artificial alterations in the levels and contours of the higher land.'
>
> "The defendants had raised the level of their land and had built a timber shed thereon. In doing so they diverted a natural stream which was flowing over that part of the land. This deviation was insufficient and inefficient for the purpose of getting the water to flow smoothly out of their land. The deviation was in fact an earth drain dug along the boundary of the plaintiffs' land. This drain was shallow uncemented and had kinks along it which contributed to the massing of water and flooding – and there were no sumps at the kinks to slow down the flow of water. The earth bund mentioned by Mr. Chester Ho could hardly have contributed to the floods. This bund is not at the rear of the factory but is along the side boundary and according to PW1 it was built as a precaution against water flowing

over to the plaintiffs' land from the defendants' land. After the 1976 flood the bund was raised by one foot.

The plaintiffs had warned the defendants in May 1974 verbally as well as by letters of the dangers as there were instances of pieces of the cliff adjoining the plaintiffs' land falling into the drain below. The defendants had promised to put up a retaining wall but they never did so. They had also not got the permission of the relevant authorities to build a timber shed and the deviation of the stream. According to PW3 this permission was necessary and in order to divert a natural stream a consultant engineer had to be engaged for the submission of plans and approval. The defendants had completely disregarded the consequences of their action and ought to have foreseen the damage which the rain water flowing from their land would have caused to neighbouring land because the natural flow had been diverted and the drain dug along the boundary was inadequate for the free flow of water.

On the evidence before me I am satisfied that the plaintiffs have proved negligence on the part of the defendants which had resulted in damage to the plaintiffs' land and property. I also accept their contention that the situation created by the defendants amounts to a nuisance."

It is pertinent to note that the questions the learned Judge had to decided were mainly questions of fact.

Apart from these questions of fact there were the particulars of negligence which we think were hardly challenged. Mr. Lim Kean Chye counsel for the appellants however submitted that this Court should not shrink from looking at the evidence. He drew our attention to two cases, namely, *Coghlan* v. *Cumberland*[1] and *Bigsby* v. *Dickinson*[2]

In *Coghlan* v. *Cumberland (supra),* an appeal raising questions of fact, Lindley M.R. observed in the course of the considered judgment of the Court (Lindley M.R., Rigby and Collins L.JJ.) –

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnessess who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he had had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

Bigsby v. *Dickinson (supra)* was an appeal on a matter of fact, and speaking of duty of Court of Appeal, it was held that

"Although the Court of Appeal, when called on to review the conclusion of a Judge of first instance after hearing witnesses *viva voce,* will give great weight to the consideration that the demeanour and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet it will in a proper case act upon its own view of conflicting evidence."

As principles of law we see no reason to disagree indeed would respectfully adopt them but the question remains whether, in the circumstances of this particular case, such finding should be interfered with by this Court. It is settled principle that each case will be considered on its own merits. In our view much depends whether in the instant case the learned Judge's finding can be said to be unwarranted by evidence. With respect we do not think it is. Though the Court is at liberty to re-examine the facts, we apprehend that on such a matter as this, where to some extent expert testimony as to technical details shall have to be depended on and which cannot be adequately reviewed in the absence of witnesses, we would be slow to disturb such a finding unless it were unsupported by evidence. In the event therefore we see no justification to depart from the long established rule in relation to findings of fact and must accordingly deal with this appeal on that basis. For authorities on this point, see *Watt* v. *Thomas,*[3] *Chow Yee Wah & Anor.* v. *Choo Ah Pat,*[4] *Muthusamy* v. *Ang Nam Cheow*[5] and *Loke Hong Kee (S) Pte. Ltd.* v. *United Overseas Land Ltd.*[6]

In our view there was ample material upon which the learned Judge could base his decision as to the facts and we agree with his conclusion. Much of what had been alleged by the respondents were either admitted or not seriously in dispute. The only controversy that came to light solely revolved round the conflicting views expressed by the expert witnesses Mohamed Tahir for the respondents and Chester Ho for the appellants. They sought to throw light as to what could have been the cause of the flood. But what we do not fail to notice is that on the evidence

admitted and the uncontroverted evidence obtaining, there was full justification for the learned Judge to arrive at a finding that he did.

Law on liability for negligence and nuisance

The principles governing the liability for damage caused by the escape of water from land are part of and derive from the law relating to negligence and nuisance and the rules in *Rylands* v. *Fletcher* – *Halsbury's* Laws of England 3rd Ed. Vol. 39 para 707.

Since the respondents had abandoned reliance on *Rylands* v. *Fletcher,* we therefore confine ourselves to only the law which relates to negligence and nuisance. What is the law concerning negligence causing damage by the escape of water amounting to nuisance? It is stated in para 709 of *Halsbury's* same edition, to the effect that

"Although an owner or occupier of land is not liable for the escape of water, naturally on land, in the course of the ordinary and proper use of the land, he may be liable if an escape of water from his land occurs in circumstances amounting to a nuisance or if the escape is caused by his negligence or by a wilful act on his part which is not within the ordinary or natural use of the land."

There is also stated in para 715 which we think is pertinent to this case to the effect that

"A person who alters the course of a natural stream will be liable for damage caused by water which escapes or overflows from the new channel due to the inadequacy or defective construction of the new channel."

In the footnote a number of cases are referred to. We cite only two of them – *Fletcher* v. *Smith*[7] and the more pertinent case of *Pemberton & Anor.* v. *Bright & Ors.*[8]

In *Fletcher* v. *Smith (supra)* it was held that

"A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence.

But where for his own convenience he does something, e.g. divert the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream, of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability."

The case of *Pemberton* v. *Bright (supra)* was a case that concerned interference with the course of a stream. The facts as stated in the headnote read –

"The plaintiffs were the owners of property situated on the east side of a road at a dip in the road, their house being below the level of the road. In between two fields on the west side of the road was a stream running eastward in a steep gulley. After passing under the road the stream travelled along the northern side of the plaintiffs' property. In 1926 the county council had widened that part of the road and had made a new culvert (a concrete pipe about two feet in diameter) to carry the stream under the road. The western entrance to the culvert was at all times unprotected by any grid. The two fields on the west side of the road came into the occupation of the first defendants in 1934, the western entrance to the culvert being on that land. From time to time a roadman employed by the country council cleaned out the mouth of the culvert to prevent it from becoming blocked by debris coming down the stream. In December, 1956, after some extremely heavy rainfall, the plaintiffs premises were flooded because the stream could not pass through the culvert as its entrance was blocked with branches of trees, leaves and mud, so that the water had flowed over the road and on to the plaintiffs' property. The absence of a grid was, to some extent at least, responsible for the flooding. In an action by the plaintiffs for damages, the trial judge held that both the first defendants and the county council were liable and apportioned the liability as to twenty-five per cent. to the first defendants and as to seventy-five per cent. to the county council. On appeal,

Held: (i) county council were liable in damages to the plaintiffs because, by constructing the culvert without a protecting grid in 1926, they had created a potential nuisance which became an actual and actionable nuisance when the culvert became blocked so that it dammed the water flowing in the stream and diverted it on to the plaintiffs' land.

(ii) the first defendants, as the occupiers of the land on which the nuisance existed, were liable in damages to the plaintiffs for having continued the nuisance."

In this case reference was made to the broad principle of law stated by Lord Finlay L.C. in the well-known case of *Greenock Corpn.* v. *Caledonian Ry. Co., Greenock Corpn.* v. *Glasgow & South Western Ry. Co.*[9] at page 572 that

"It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable."

Turning further to this appeal, we would stress that the learned Judge had before him ample cir-

cumstances of considerable importance to enable him to make a finding of fact that appellants did substantially interfere with the natural state of their land when they filled the ponds, diverted the course of the stream and raised the level of their land. Under the circumstances the respondents, as the owners of the lower ground, were no longer obliged to receive water from the higher ground; indeed if damage should result on account of the water that was no longer flowing naturally from the higher ground the owner of the higher ground should be liable.

Conceivably the depletion of the ponds increased the overflow. Previously the flow of surface water would have gone into the ponds serving as flood-controlled reservoir. The overflow was invariably reduced and this helped to alleviate flood. As for the diversion of the stream there was no doubt that it constituted an interference of the natural waterway then in existence affecting thereby the natural flow of water. Furthermore the cutting of the cliff created further nuisance as when it rained chunks of earth collapsed and silted up the drains. In our judgment the learned Judge was right in concluding that the flooding of the respondents' land and the consequential damage was directly and effectively caused by the negligent acts of the appellants. Such acts conceivably had created nuisance.

For these reasons we see no justification to interfere with the learned trial Judge's finding. The appeal on liability is accordingly dismissed.

Damages

We now turn to the appeal on damages.

The learned Judge allowed the claim for damages to the respondents' buildings and goods. No order however was made on the respondents' claim for loss and damage for the stoppage of work due to the flood. In a supplementary judgment after re-opening the case to hear arguments on damages, the learned Judge awarded $27,177.00 for loss of profits and $20,000.00 for inconvenience.

Mr. Lim Kean Chye contended that the Court had no jurisdiction to re-open the case and assess damages as it was *functus officio*. He cited *Re Barrell Enterprises & Ors.*[10] to support his argument. Mr. Ranjan counsel for the respondents however submitted that as no order had been extracted it was therefore perfectly in order for the Court to re-open the case. He cited in support the case of *In Re Harrison's Share Under A Settlement, etc.*[11] where the question of jurisdiction of a Judge to recall an order pronounced but not perfected was raised. It was held –

> "Applications were made for approval by the court on behalf of infant, unborn and unascertained persons of schemes affecting family trusts. On March 15 and 17, 1954, a judge in chambers, applying decisions of the Court of Appeal, pronounced orders approving the schemes. On March 25, 1954, the House of Lords gave its decision in *Chapman* v. *Chapman* [1954] A.C. 429; [1954] 1 All E.R. 798, which made it clear that the judge had no jurisdiction to make the orders.
>
> At that date none of the orders in question had been entered, and the judge directed the registrars concerned not to proceed further with them, as he desired to hear further argument. The matter was adjourned into court, and all the parties to the applications contended that the judge had no power to, or alternatively ought not to, recall the orders which he had pronounced. The judge varied the orders originally pronounced. On appeal by the plaintiffs:–
>
> **Held**, that an order pronounced by a judge, whether in open court or in chambers, can always be withdrawn, altered or modified by him, either on his own initiative or on the application of a party, until such time as the order has been drawn up, passed and entered. The oral order is meanwhile provisionally effective, and can be treated as a subsisting order where the justice of the case requires it and the right of withdrawal would not thereby be prevented or prejudiced.
>
> Where a judge has orally pronounced an order which is correct according to the authorities as they stand at the time, but before the order has been perfected it is authoritatively declared that the order made was outside his jurisdiction, it is right that the judge should withdraw the oral order originally pronounced by him.
>
> When a judge has pronounced judgment, he retains control over the case until the order giving effect to his judgment is formally completed; such control, however, must be used in accordance with his discretion, exercised judicially and not capriciously."

Counsel for the appellants submitted that a distinction can be drawn in that *Harrison's* case *(supra)* was an oral judgment whereas in the present case a written judgment was already delivered. Although there is this distinction as pointed out by learned counsel for the appellants, we do however think that this would alter the fact that, where, as in the present case, not all the quantum respecting the claims were finally assessed and at the date of the re-opening of the case no order had yet been extracted.

With respect, we see no merits in the appellants' contention. We are firmly of the view that where it is necessary and the justice of the case re-

quires it, the Court should be at liberty to re-open the case. It is particularly so where there has only been a provisional order and this is done to perfect an order. In the present case we think that the learned Judge had acted correctly when he re-opened the case with a view to perfecting the order.

As for the damages awarded, we see no reason to differ from the decision of the learned Judge. The damages assessed in respect of the claim for damages to land, fence, building, plant, machinery, raw materials and finished goods and also the loss of profits were supported by facts and figures as set out in Tharmalingam's report. However we do not see how the learned Judge came to assess the damages for inconvenience. The claims under para 15 and 16 of the Statement of Claim are in the nature of special damages and no claim was made in the Statement of Claim in regard to inconvenience which is strictly a claim for general damages. Furthermore nothing was said by counsel for the respondents in his submission either before the written judgment was delivered or in the course of arguments when the case was re-opened for assessment of damages.

For reasons stated we accordingly also dismiss the appeal except $20,000.00 damages on inconvenience which we allow. In this respect we set aside the order of the learned Judge.

As the sum allowed constitutes a small percentage of the total damages awarded, we do not consider fit to award costs to the appellants. The respondents are awarded costs of this appeal.

Appeal dismissed.

Solicitors: *Lim Kean Chye & Co.; Ng Ek Teong & Rakan-Rakan.*

HEADMISTRESS, METHODIST GIRLS SCHOOL & ORS. v. HEADMASTER, ANGLO-CHINESE PRIMARY SCHOOL & ANOR.

[F.C. (Salleh Abas Ag. L.P., Abdul Hamid & Abdoolcader F.JJ.) January 23 & February 23, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 198 of 1982]

Tort – Negligence – Injury caused to pupil knocked down by school bus whilst walking in compound of school – Liability of driver of school bus and owner of bus – Liability of school authority for allowing bus in school compound – Duty of owner and occupier of premises to keep school premises safe.

In this case a pupil aged 9 years was knocked down by a school bus while walking in the compound of his school, the Anglo-Chinese Primary School, in order to go home. He sustained serious injuries and sued the appellants (the bus owners and the driver) for damages. The appellants in turn brought in the respondents (the Headmaster of the school and the Government) as the third party claiming contribution in the event of liability against them on the ground that they as school authorities were also partly liable for allowing the bus to enter the school compound. The trial judge found the appellants wholly liable and awarded the plaintiff the sum of $20,000.00 as general damages and dismissed the appellant's claim for contribution. The appellants appealed against the dismissal of their claim for contribution.

Held: (1) as owner and occupier of the premises, the respondents, the school authorities were under a duty to keep the school premises safe. In the circumstances of this case it is extremely difficult to hold the school authorities free from any blame. They must share the blame with the appellants;

(2) in view of the fact that their fault only consists of allowing the bus to come in, which is a privilege the bus need not have to make use of, or a risk which it need not have taken, the blame on the school authorities should be of lesser degree than that of the appellants, the bus owners and the driver;

(3) the total liability should be apportioned at 30% against the respondents (the school authorities) and 70% against the appellants (the bus owners and the driver).

FEDERAL COURT.

Ng Chee Kong for the appellants.

M. Mahalingam, Senior Federal Counsel, for the respondents.

Salleh Abas Ag. L.P. (delivering the Judgment of the Court): On June 5, 1973 at about 12.30 p.m. the plaintiff, one Hew Wan Hoong, who was then an infant, aged 9 years old, whilst walking in the compound of his school, (Anglo-Chinese Primary School) in order to go home was knocked